89-116

No. A-883

SUPREME COURT OF THE UNITED STATES

Spring Term 1989

JERRY GRONQUIST, d/b/a GRONK'S
DONUT AND SANDWICH SHOP,

Petitioner,

v.

BOULDER URBAN RENEWAL AUTHORITY;
DOUGLAS L. HOUSTON, EXECUTIVE DIRECTOR OF BURA;
THOM MANN, individually and as REAL ESTATE AND
RELOCATION OFFICER OF BURA;

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

Jerry Gronquist, pro se
1539 Madison Court
Louisville, CO 80027
(303) 666-9421

July 15, 1989

A. QUESTIONS PRESENTED FOR REVIEW

WHETHER A LEASEE IS CONSTITUTIONALLY ENTITLED TO COMPENSATION FOR LOSS OF A PROFITABLE BUSINESS WHICH IS DESTROYED BY THE TAKING OF THE LEASEHOLD PREMISES FOR A GOVERNMENTAL PURPOSE.

B. TABLE OF CONTENTS AND AUTHORITIES

Table of Contents

Table of Authorities

Laws, Ordinances and Statutes

Other Authorities

C. OFFICIAL AND UNOFFICIAL REPORTS

None

D. JURISDICTIONAL GROUNDS

1. Judgment to be reviewed is denial of a writ of certiorari by Supreme Court of State of Colorado en blanc, February 6, 1989, affirming a holding for respondents herein by the Colorado Court of Appeals on August 25, 1988.

2. No rehearing has been requested in the Colorado Supreme Court. An extension of time to file this Petition for Certiorari was submitted to the Court and granted until and including June 6, 1989.

3. The Court has jurisdiction to consider this Petition for Certiorari pursuant to 28 U.S.C. §1257(1) and 1257(2).

E. APPLICABLE LAW

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Constitution of the United States, Amendment 14, Section 1.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or a public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation. United States Constitution, Fifth Amendment

F. STATEMENT OF THE CASE

On March 13, 1979, when the Boulder Urban Renewal Authority (hereinafter BURA) was formed, petitioner was the owner and operator of Gronk's Donut and Sandwich Shop located at 2984 Peak Avenue in Boulder, Colorado. Petitioner's products were locally popular and his shop successful, however it was located within an area designated by BURA as blighted and therefore subject to condemnation as part of the Crossroads Shopping Center Redevelopment Area. At the time of this petition, all improvements to property within the original redevelopment area have been leveled and a large closed shopping mall has been erected on the site with the assistance of the City of

Boulder. BURA's actions in facilitating the construction of Crossroads Mall are authorized by Colorado State Statute 31-25-105, C.R.S. 1973 and Boulder Municipal Ordinance No. 4411.

Petitioner was represented by counsel throughout, but received no recovery from the condemnation proceeding. A commitment of $67,000 in relocation expenses was made by BURA during September 1981. In making its offer, the sole item of expense claimed by petitioner and disallowed by BURA was a grease trap ventilation hood. In petitioner's then existing location, he had been exempt from a local ordinance requiring a specialized hood, however the additional equipment would be required in any new location utilized by petitioner's business. All administrative appeals by petitioner within BURA were denied. In order to initate the BURA process, petitioner had been required to rent a new premises for his business. Due to delays caused by the BURA appeal process, it became impossible for petitioner to fulfill his obligation on the new lease which was terminated by the landlord.

On June 1, 1982, petitioner was evicted from his business within the urban renewal area and has never been able to reopen his business. BURA paid to petitioner $8,000 with which to store his equipment, the balance of authorized relocation expenses was never paid.

G. STATE COURT PROCEEDINGS

On July 8, 1982, petitioner filed suit against BURA and various of its officers alleging that their wrongful conduct had prevented him from receiving fair compensation (Petitioner's Complaint, Attachment A). On February 25, 1983, defendants filed their first motion for summary judgment (Attachment B) on the basis of an alleged failure by petitioner to give timely notice pursuant to Colorado governmental immunity statute. By a Minute Order dated May 16, 1983 (Attachment C), the Boulder District Court granted respondent's motion for summary judgment. Colorado's Court of Appeals reversed Boulder District Court's ruling on soverign immunity and remanded the case for trial (Attachment D).

Back in Boulder District Court, defendants filed a new motion for summary judgment on the basis that petitioner was seeking to enforce a nonexistent constitutional right pled as a tort and that respondents' actions were in all respects protected by sovereign immunity (Attachment E). Boulder District Court after first denying the motion, granted respondent's motion for summary judgment one week prior to trial on May 19, 1986 (Attachment F). It was found by the district court as a matter of law that petitioner possessed no constitutional right to compensation and that respondents had not exceeded their discretion and, therefore, were protected by sovereign immunity.

It has been well settled under Colorado case law that a business owner leasee is not entitled to compensation for loss of business as a result of urban renewal authority activity, Auraria Businessmen v. DURA, 183 Colo. 411, 517 P.2d 845 (1974). The Colorado Court of Appeals expressly affirmed Boulder District Court's ruling on petitioner's lack of any property rights in its opinion dated August 25, 1988,

(Attachment G). Colorado Supreme Court denied certiorari without comment on February 6, 1989 (Attachment H).

H. ARGUMENT

Review of this case on certiorari should be granted for reasons set out in Sup.Ct.R. 17 (b) and (c). The Colorado Court of Appeals ruling affirmed by Colorado's Supreme Court is in conflict, both with respect to rationale and result, with rulings which have been made by this Court, Circuit Courts of Appeal, and courts of last resort in other states. Of course, given the current status of the law with respect to the nature of property rights held by a business leasee when a government taking occurs; any ruling made by the Colorado Supreme Court would have been in conflict with the holding of some state's supreme court or federal circuit. In addition to meeting the requirements of the Supreme Court rules cited, this case should be reviewed in order to clarify apparently misunderstood prior rulings of this Court with regard to how the existence of property rights for the purpose of the Fifth Amendment's taking clause are to be determined.

A clear pronouncement from this Court defining property rights for Fifth Amendment purposes has been urgently needed since the Court's ruling in San Diego Gas and Electric Company v. San Diego, 450 U.S. 621 (1980) wherein the federal taking clause was made applicable to the states for the first time. Given that federal law with regard to the taking clause was, at the time San Diego Gas was decided, also going through some changes as a result of the landmark ruling in Penn Central Transporation Company v. New York City, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978), it is perhaps not surprising that state and federal courts have been uneven if not unsure as to the principals applied. In this case, Colorado's misinterpretation has caused a considerable amount of damage.

Traditionally, the issue has been couched in terms of whether or not "consequential" damages such as loss of profits, loss of good will, loss of going business value, and other intangibles must be compensated for in the event that they are damaged or

destroyed by a government taking. State courts, Colorado among them, and federal circuits tend to resolve the issue of intangible property rights by identifying catagories of property which are then always held to be either compensible or noncompensible. This Court's recent decisions have demonstrated that intangible property rights are sometimes compensible and sometimes noncompensible depending on the facts and circumstances of the case.

A process of balancing equities is implied in this Court's earliest decisions in the area of consequential damages. While in Mitchell v. United States, 267 U.S. 341 (1925), farmers did not receive additional compensation for alleged unique growing properties of their condemned land, the owners of a laundry in Kimball Laundry v. United States, 338 U.S. 1 (1948), received the full value of their business as a growing concern when the laundry was taken over by the United States Army. "The question is, what has the owner lost, not what has the taker gained, Boston Chamber of Commerce v. Botton, 217 U.S. 189, 195", Kimball Laundry, Supra at 13. See also U.S. v. Cosby, 328 U.S. 256 (1946).

Unfortunately, the holding in Kimball Laundry was limited to its facts because in that case the government took over and ran the business as a laundry. For most of the twentieth century, it has been uniformly held that where a business is merely destroyed by government action but not taken over and run by the government, intangible damages such as loss of profits were not compensible. This harsh interpretation has been strongly criticized by many scholars. See Aloi and Goldberg, A Reexamination of Value, Good Will and Business Losses in Eminent Domain, 53 Cornell L.Rev., 604 (1968); Spies and McCord, Recovery of Consequential Damages in Eminent Domain, 48 Va. L.Rev. 437 (1962); Slavitt, Inequalities and Injustices of Condemnation Acquisitions, 40 Conn. B.J. 11 (1966); McCormick, The Measure of Compensation in Eminent Domain, 17 Minn. L.Rev. 461 (1933); Searless and Rapheal, Current Trends in Law of Condemnation, 27 Fordum L.Rev. 529 (1958-1959).

Some state and federal courts found jusification for exceptions from the no consequential damages rule to ammoriate the often harsh results. Certain states

held that leasehold interests in condemnation proceedings could be valued based upon the loss to the business being conducted on the leasehold. In Re Grant Haven Parkway, 97 NW.2d 748 (1959); In Re Winding Michigan Avenue, 273 N.W. 798 (1937); St. Agnus Cemetery v. State, 163 NYS.2d 655 (1957); City of St. Louis v. Union Quarry Construction Company, 394 SW 300 (Mo. 1965); Phillips Petroleum Company v. City of Omaha, 106 NW.2d 727 (1960) and note the comparison between In Re Larned-Battes Rehabilitation Project v. Whaling, 202 N.W.2d 816 (Mich. 1978) and Michigan State Highway Commission v. L & L Concession Company, (Mich. Ct. App. 1971). Certain states have held that their state takings clauses supported an award for consequential damages even where the federal takings clause might not. Bowers v. Fulton County, 146 S.E.2d 884 (Geo. 1966); Louver vs Milwaukee County, 177 N.W.2d 384 (Wisc. 1970); Jacksonville Expressway Authority v. Henry C. Dupree Company, 108 So.2d 289 (Fla. 1959). Federal as well as state courts justified awards for consequential damages if the taking of a license to do business was involved. Todd v. U.S.,

292 F.2d 841 (Ct. Claims 1961); Jackson v. U.S., 103 F.Supp. 1019 (Ct. Claims 1952); State of Minnesota v. Saugen, 169 N.W.2d 37 (Minn. 1969).

Clearly, an absolute rule requiring noncompensation for intangible assets destroyed by government taking is untenable. Rather than exercising its option of citing Mitchell v. United States, Supra as its rationale for denying plaintiff recovery for loss of airspace rights in Penn Central Transportation Company v. New York City, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978), this court went on to announce a three-part test for determining whether a conpensatable property has been taken as a result of government action. This three-part test consists of: 1. the economic impact of the regulation on the claimant; 2. the extent to which regulation has interferred with distinct investment backed expectation; and 3. the character of government action. These three factors are intended to be a guide for a case by case judgment of the facts. "There is no abstract or fixed point at which judicial intervention under the taking clause becomes appropriate . . . Resolution of each case, however,

ultimately calls as much for the exercise of judgment as for the application of logic. Andrus v. Allard, 444 U.S. 51, 62 L.Ed.2d 210, 106 S.Ct. 310 (1979). Unfortunately, in recent cases, with the notable exception of Connely v. Pension Benefit Guarantee Fund, 475 U.S. 211, 81 L.Ed.2d. 166, 106 S.Ct. 108 (1986), this Court has not always expressly followed its three-part test announced in the Penn Central case and in some instances seems to have contradicted its holding in Penn Central v. New York City.

Instead of using the three-factor test in Ruckelshause v. Monsanto Company, 467 U.S. 986, 81 L.Ed.2d 815, 104 S.Ct. 1962 (1984), the Court relied on rationale from an older case often cited by courts which are holding that intangible rights are compensible,

> "It is conceivable that (the term property in the taking clause) was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises his rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter." United States v. General Motors Corp., 323

US 373, 377-378, 89 L.Ed 311, 65 S. Ct. 357, 156 ALR 390 (1945)" Ruckelshaus v. Monsanto Co., Supra at 1003

Another opportunity for use of the three-part test of Penn Central Transportation Company v. New York City was lost in this Court's correct ruling that a shopping center mall owner does not have a constitutionally protected right to be free from high school students circulating petitions in Pruneyard Shopping Center v. Robins, 447 US 74, 64 L.Ed.2d 741, 100 S.Ct. 2035 (1980). Instead the Court in Pruneyard Shopping Center cited as its rationale another often used quote from Armstrong v. United States, 364 US 40, 48, L.Ed. 2d 1554, 80 S.Ct. 1563 (1960) "(Does the taking) force some people alone to bear the burdens which, in all fairness and justice, should be borne by the public as a whole."

Use of the three-part test can be implied in a case of Kaiser Aetna v. United States, 444 U.S. 164, 62 L.Ed.2d 332, 100 S.Ct. 383 (1979). Plaintiffs in this case had dredged a pond which formerly had been no more than two feet in depth, to a sufficient depth so it could be used for boating and swimming and had

developed the surrounding area as a resort. In holding that the resulting body of water was subject to regulations as far as navigation, but not required to be opened to the public, the Court ruled that the United States government was estopped by its failure to insist on public access when granting the dredging permit. In essence, the Court in Kaiser Aetna ruled that the plaintiff had a legitimate investment backed expectation with which enforcement of the law would interfere.

There are two cases decided since Penn Central Transportation Company v. New York City which do not follow its rationale nor do they concur in their result; these are Loretta v. Teleprompter Manhattan CATV Corp., 458 US 419, 73 L.Ed. 2d 868, 106 S.Ct. 3164 (1982) and Hoddle v. Virginia Surface Mining and Reclamation Assoc., 452 US 264, 69 L.Ed.2d 1, 101 S.Ct. 2352 (1981). In Loretto v. Teleprompter, Supra, it was held that there was no taking because government intrusion was "temporary" as opposed to "permanent" when installing cable t.v. wire in plaintiff's apartment building. Hoddle v. Virginia

Surface Mining, Supra, was decided on the basis that governmental regulation as to methods in strip mining now prevent the owner from making the best economic use of his property. It should be noted that Hoddle was primarily an interstate commerce case and not argued primarily on the basis of the takings clause.

Despite applicability of federal takings clauses to the states, the number of states that are willing to recognize that there is potentially protected property interest involved in a loss of business as a result of government action is in the minority; these include Connecticut, Gebrain v. Bristol Redevelopment Agency, 370 A.2d 1055 (Conn. 1976); Georgia, DeKalb County v. Cowan, 261 S.E.2d 478 (Ga. App. 1979); Louisiana, State Dept. of Highway v. Constant, 359 So.2d 666 (La.App. 1978); Minnesota, Housing and Redevelopment Authority of St. Paul v. Nagele Outdoor Advertising Company of Twin Cities, 282 N.W.2d 537 (Minn. 1979); Montana, State Highway Commission v. Donnes, 609 P.2d 1213 (Mont. 1980); Pennsylvania, In re Alexis, 402 A.2d 1119 (Pa.Comm.1979); Texas, Della v. Southwestern Bell Tele. Co., 774 F.2d 1287 (Ca.5

Tx); California, People Ex Rel Dept. of Transportation v. Muller, 681 P.2d 1346 (Ca. 1984); Florida, Slacter v. City of St. Petersburg, 449 So.2d 1006 (Fla.App. 1984); New York, Troup Realty Inc. v. State of New York, 88 A.D.2d 173 (NY Ad 1982); Vermont, Sharp v. Transportation Board State of Vermont, 451 A.2d 1074 (Vt. 1982); Alaska, State v. Hammer, 550 P.2d 820 (Alaska 1976). All states not mentioned above adhere to the general rule that business losses are not compensible when they occur as a result of a state taking.

Positions taken by the federal circuit appeals courts vary. At least one circuit has held that loss of business can be compensated depending on the nature of the property right and the nature of the taking; other courts hold that business loss may be compensated only if it is occasioned by the taking of a real property interest; while some circuits still hold that a business loss may not be compensated under any circumstance.

The Fifth Circuit has held that consequential damages are coverable to a land owner damages

resulting from violation of an easement by the telephone company Gully v. Southwestern Bell Telephone Co., 774 F.2d 1287 (Ca. 5 1985). ". . . a landowner and businessman who loses, as a result of eminent domain, both the land upon his business rests as well as the business itself, may be compensated both for the market value of the land and for the profits he will not be able to recoup upon relocation." Gulley v. Southwestern Bell at 1293.

The Federal Circuit is quite clear that claim for loss of business is only compensible when land has been taken, Yachts America Inc. v. United States, 779 F.2d 656 at 660 (Fed.Cir. 1985). The Ninth Circuit is firm in its ruling that consequential damages are never compensible even when the land has been taken, see U.S. v. 57.09 Acres of Land, 757 F.2d 1025 (Ca.9 1985) where the Court held that evidence as to the value of business being conducted on the land could not have been admitted. "This is evidence of a business loss, which, under Federal Condemnation Law, is not compensible.", U.S. v. 57.09 Acres of Land, Supra at 1029.

Despite the fact that this Court has addressed this issue directly or indirectly no fewer than eight times since 1979, there is still much lack of uniformity and injustice taking place. If this petition is granted and the Court applies its three-part test announced in Penn Central Transportation Co. v. New York City, then, this Court will find petitioner's legitimate property interest has been taken and destroyed by the State of Colorado and the City of Boulder. This case also presents an opportunity to reaffirm the precedent of Penn Central Transportation Company v. New York City case, Supra and Connoly v. Pension Benefit Guarantee Fund, Supra, thereby clarifying nationwide the definition of property for which compensation must be paid under the Fifth Amendment Takings Clause.

Respectfully submitted,

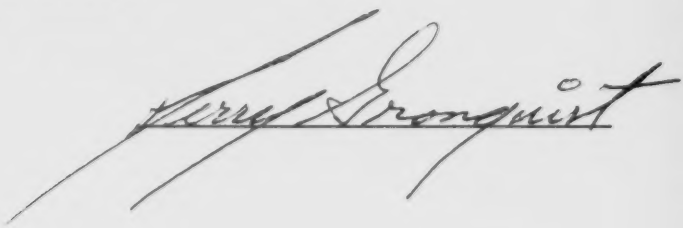
Jerry Gronquist
Appellant
1539 Madison Court
Louisville, Colorado 80027
(303) 666-9421

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18 day of July, 1989, a true and correct copy of the foregoing Petition for Certiorari was deposited in the United States mail, postage prepaid and addressed to:

Alan Epstein, Esq.
HALL & EVANS
1200 17th Street, Suite 1700
Denver, Colorado 80202

Mac V. Danford
Supreme Court of Colorado
State Judicial Building, Room 415
2 East 14th Avenue
Denver, Colorado 80203



Attachment A

DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO

Civil Action No. 82CV0957, Division 3

COMPLAINT

JERRY GRONQUIST, d/b/a/ GRONK'S
DONUT AND SANDWICH SHOP,

Plaintiff,

vs.

BOULDER URBAN RENEWAL AUTHORITY;
DOUGLAS L. HOUSTON, EXECUTIVE DIRECTOR OF BURA;
TOM MANN, individually and as REAL ESTATE AND
RELOCATION OFFICER OF BURA;

DEFENDANTS.

COMES NOW, the Plaintiff by and through his attorney, Ronald H. Holmes, and in this action against the Defendant alleges as follows:

FACTS GIVING RISE TO THE CASE

1. That at all times pertinent hereto the Plaintiff was a business owner doing business in the City of Boulder, State of Colorado.

2. That at all times pertinent hereto, Plaintiff's business was located at 2984 Peak Avenue, Boulder, Colorado.

3. That at all times pertinent hereto, the property as described above was located within the Crossroads Shopping Area, Boulder, Colorado.

4. That at all times pertinent hereto, the business of the Plaintiff was in the Redevelopment Area of the Boulder Urban Renewal Authority.

5. That the defendant, Boulder Urban Renewal Authority was formed on or about March 13, 1979, by the Boulder City Council pursuant to Ordinance No. 4411.

6. That Defendants Houston and Mann are employees of the Boulder Urban Renewal Authority.

7. That the Boulder Urban Renewal Authority was charged with developing the Boulder Valley Regional

Center (Crossroads Shopping Center) through the condemnation of certain properties.

8. That the Boulder Urban Renewal Authority in pursuit of their obligations described above, issued a relocation handbook dated June 24, 1980.

9. That the Boulder Urban Renewal Authority intended that the handbook describe requirements governing the provision of relocation payments and other relocation assistance to persons and businesses displaced as a result of acquisition of property pursuant to the Urban Renewal Plan.

10. That the Plaintiff's business was within the area of the redevelopment and therefore, subject to the Relocation Plan of the Boulder Urban Renewal Authority.

11. That pursuant to said Plan, the Plaintiff applied for relocation benefits to the Defendant, Boulder Urban Renewal Authority.

12. That the Plaintiff advised the defendant, Boulder Urban Renewal Authority of his intent to relocate.

13. That the Plaintiff informed the Defendant, Boulder Urban Renewal Authority through their employees, Tom Mann and Douglas L. Houston of his intent to relocate during the month of April, 1981.

14. That Plaintiff, as required in the relocation Handbook adopted by the Boulder Urban renewal Authority, requested and was granted a waiver of the 120 day elegibility requirement effective April 8, 1981.

15. That prior to this time, the Plaintiff had found a suitable location to relocate.

16. That in contemplation of relocation, the Plaintiff entered into a lease on March 16, 1981, for this new facility.

17. That within approximately one week from the signing of the lease mentioned above, the Plaintiff presented a signed copy of the lease as well as a summary of expenses for the move to Mr. Tom Mann of the Boulder Urban Renewal Authority.

18. That the summary of expenses for the move which was submitted to Mr. Tom Mann showed expenses of over $85,000.

19. That because of delays created by the Defendant, Boulder Urban Renewal Authority and specifically Defendant, Tom Mann, the above mentioned lease had to be extended on at least one occasion.

20. That because of inexcusable delays on the part of the Defendant, Boulder Urban Renewal Authority and its employees, no relocation settlement agreement was submitted to the Plaintiff until the month of September, 1981.

21. That the amount of relocation settlement agreement was for approximately $57,000 as opposed to the original request.

22. That the Plaintiff then appealed the decision regarding the relocation payment to the Relocation Committee of the Boulder Urban Renewal Authority.

23. That on October 10, 1981, the Plaintiff received Notice from the Relocation Committee, that the amount the Urban Renewal Authority would pay would be limited to $57,000.

24. That because of this extraordinary and inexcusable delay, the lease signed by the Plaintiff had expired, and the property was no longer available for his use.

25. That the Plaintiff attempted to find other suitable locations for his business, but was unable to do so.

26. That the Plaintiff's lease in the Redevelopment Area was terminated on June 1, 1982, by the Boulder Urban Renewal Authority.

27. That the Plaintiff then was forced to close his business and could not move to a new location since no suitable locations were available.

28. That the Plaintiff is not in business at this time.

FIRST CLAIM FOR RELIEF

29. Paragraphs 1 through 28 are incorporated herein by this reference and made a part hereof.

30. The Defendants, and Tom Mann, individually, and as an employee of the defendants, by their unreasonable acts, have caused the Plaintiff to lose his business.

31. Because of the unreasonable acts of the Defendants individually and collectively, Plaintiff has been damaged in the sum of $175,000.00.

SECOND CLAIM FOR RELIEF

32. Paragraphs 1 through 31 are incorporated herein by this reference and made a part hereof.

33. That the acts of the Defendants and Tom Mann, individually and collectively as an employee of the Defendants, are so utterly intolerable in a civilized community as to constitute extreme and outrageous behavior.

34. That as a direct result of the Defendants' action, that Plaintiff has suffered from severe emotional distress due to the nervous shock, shame, humiliation, embarrassment, anger, and worry caused by the Defendants, all to the Plaintiff's damage in the sum of $750,000.00.

THIRD CLAIM FOR RELIEF

35. Paragraphs 1 through 34 are incorporated herein by reference and made a part hereof.

36. That in doing the things alleged herein, Defendants acted maliciously and were guilty of wanton disregard of the right of the Plaintiff thereby entitling Plaintiff to exemplary damages in the sum of Three Million Five Hundred Thousand Dollars.

WHEREFORE, Plaintiff prays that this Court finds in behalf of the Plaintiff and against the Defendants, Boulder Urban Renwal Authority, Douglas L. Houston, and Tom Mann, jointly and severally as follows:

A. $175,000.00 for Plaintiff's loss of profits, loss of business and loss of future business.

B. $750,000.00 for extreme and outrageous conduct by the Defendants.

C. Three Million Five Hundred Thousand Dollars for exemplary damages.

D. Interest, costs, attorney's fees and whatever other relief the Court deems just and proper.

Respectfully submitted,

Ronald H. Holmes #10219
Attorney for Plaintiff
1245 Pearl Street, Suite 202
Boulder, Colorado 80302
440-4404

Plaintiff's Address;
1539 Madison Court
Louisville, Colorado

VERIFICATION

I certify that I have read the above and foregoing Complaint, that I know the contents thereof, and that the same is true to the best of my knowledge and belief.

_____

JERRY GRONQUIST

Sworn to and subscribed by Jerry Gronquist on this 8th day of July, 1982.

Witness my hand and seal.

My commission expires: 6/25/85

_____

Notary Public and Address

1245 Pearl Street

Boulder, Colorado

Attachment B

DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO

Civil Action No. 82CV0957, Division 3

MOTION FOR SUMMARY JUDGEMENT

JERRY GRONQUIST, d/b/a/ GRONK'S
DONUT AND SANDWICH SHOP,

Plaintiff,

vs.

BOULDER URBAN RENEWAL AUTHORITY; DOUGLAS L. HOUSTON, Executive Director, BURA; TOM MANN, individually and as Real Estate and Relocation Officer of BURA,

Defendants.

COME NOW the above-named Defendants, by and through their attorneys, HALL & EVANS, and respectfully request that this Court enter an Order granting Summary Judgment in their favor and against the Plaintiff, on the grounds that the Plaintiff has failed to comply with the notice provisions of the Colorado Governmental Immunity Act as set forth more fully in the attached Memorandum Brief.

WHEREFORE, these defendants request that the Court enter an Order in favor of these Defendants dismissing this action, and for such other and further relief as this Court deems proper.

John P. Mitzner (No. 3732)
of HALL & EVANS
Attorneys for Defendants
717-17th Street, Suite 2900
Denver, Colorado 80202
293-3500

CERTIFICATE OF MAILING

I hereby certify that I have duly served the within Motion for Summary Judgment and Memorandum Brief in Supprot of Motion for Summary Judgment by placing a true and correct copy thereof in the U.S.Mails, postage prepaid, correctly addressed to Ronald Holmes, Attorney at Law, 1245 Pearl Street, Suite 202, Boulder, Colorado 80302, this 25th day of February 1983.

DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO

Civil Action No. 82CV0957, Division 3

MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

JERRY GRONQUIST, d/b/a/ GRONK'S DONUT AND SANDWICH SHOP,

Plaintiff,

vs.

BOULDER URBAN RENEWAL AUTHORITY; DOUGLAS L. HOUSTON, Executive Director, BURA; TOM MANN, individually and as Real Estate and Relocation Officer of BURA,

Defendants.

COME NOW the above-named Defendants, by and through their attorneys, HALL & EVANS, and in support of their Motion for Summary Judgment, submit the following Memorandum Brief:

I. THE PLAINTIFF HAS FAILED TO COMPLY WITH THE NOTICE PROVISIONS OF THE COLORADO GOVERNMENTAL IMMUNITY ACT AND, THEREFORE, HIS COMPLAINT AS TO THESE DEFENDANTS MUST BE DISMISSED.

It is the contention of these Defendants that the complaint herein should be dismissed as to these Defendants for failure to comply with the notice provisions of the Colorado Governmental Immunity Act. Essentially, these Defendants assert that there has been no compliance nor pleading asserting compliance with the provisions of C.R.S., 1973, 24-10-101, et seq., as amended.

Initially, the Court should note that there is no pleading in the Complaint which alleges compliance with the above-cited statute. As this Court is aware, there have existed in the State of Colorado many and various notice provisions under both City charter and State statute with reference to the subject of notice to various public entities and public employees following alleged injuries to a party or parties by that public entity or public employee. In this respect, "the Complaint must show that the written notice

required by statute has been given, or it fails to state a cause of action." Peek v. Lamar, 87 Colo. 107, 285 p. 168 at page 109 of the Colorado Reporter. More recently, the case of Fritz v. Regents of University of Colorado, 586 p.2d 23, 196 Colo. 335 (1978) has stated that the notice requirement is a condition precedent to the right to maintain an action against the public entity or public employee and furthermore, that it is mandatory. See also Jones v. Kristensen, 563 p2d 959, 38 Colo. App. 513, affirmed 575 ;.2d 854, 195 Colo. 122 (1977). Additionally, it would seem under the Rules of Civil Procedure of this State that compliance with all conditions precedent is a prerequisite to any pleading in which the underlying claim involves a condition precedent. The first paragraph of C.R.S. 24-10-101 declares the notice provision this Defendant is referring to, to be a condition precedent.

In any event, these Defendants recognize that the omission of a paragraph in a Complaint and a Motion for Summary Judgment based thereon is a somewhat pendantic argument. However, it is also the

position of this Defendant that, in fact, said notice has not been given in compliance with the Governmental Immunity Act and there exists, therefore, a "complete defense" under said Act.

These Defendants, would, therefore, also respectfully direct the Court's attention to the fact that under those cases which abrogated sovereign immunity as a judicial concept, the Supreme Court of Colorado has stated in no uncertain terms that the defense of sovereign immunity now exists in whatever status the legislature desires to put it. As the Supreme Court stated in Evans v. Board of County Commissioners of El Paso County, 493 p2d 968 at page 972:

> "The effect of this opinion and its two contemporaries is simply to undo what this Court has done and leave the situation where it should have been at the beginning, or at least should be now; in the hands of the General Assembly of the State of Colorado. If the General Assembly wishes to restore sovereign immunity and governmental immunity in whole or in part, it has the authority to do so. If the legislative arm of our government does not completely restore these immunities, then undoubtedly it will wish to place limitation upon the actions that may be brought against the State and its subdivisions. This too, it has the full authority to accomplish."

Quite obviously then, the legislature has placed limitation upon the right to sue the State and its employees acting within the scope of their employment. This limitation is the requirement of notice within 180 days following the "injury".

The statute is quite literal in requiring that the notice be received by the appropriate person within that public entity within 180 days of the "injury". C.R.S. 24-10-103(2) defines "injury" as follows:

> "Injury" means death, injury to a person, damage to or loss of property, of whatever kind, which would be actionable in tort if inflicted by a private person."

The legislature, having the power to place strict limitations on suits against the State and its employees, has not provided any exceptions to the requirement that notice must be sent to a specific person within a specific time following the "injury".

In the instant case the Plaintiff alleges and complains in paragraph 23 of his Complaint that he received notice from the Relocation Committee that the amount the Urban Renewal Authority would pay would be

limited to $57,000 on October 10, 1981. This is the date upon which the injury, which is the complaint of the Plaintiff occurred. No notice purporting to comply with the notice provisions of the Colorado Governmental Immunity Act was received by these Defendants until May 3, 1982, as evidenced by the affidavit attached hereto as Exhibit A. Obviously, said notice was not within the 180 notice requirement as set forth under the Act.

Finally, those decisions construing that various predecessor statutes requiring notice in the State of Colorado have been very exacting. The requirement of notice pursuant to the provisions of the statute have been classified as "mandatory". See Fritz v. Regents of University of Colorado, supra., Fisher v. Denver, 123 Colo. 158, 225 p.2d 828, Armijo v. Denver, 123 Colo. 304, 288 p.2d 989, and Powell v. Brady, 508 p.2d 1254. Additionally, the very earliest Colorado cases, which are still viable law in this State, have even been more exacting. Very strict adherence to the form of the notice and the delivery of the notice to the correct person has been required by the Colorado

Appellate Courts in both Denver v. Saulcey, 38 p. 1098, and Stoors v. Denver, 73 p. 1094. The Colorado Supreme Court in these cases has characterized very minor defects in compliance with notice provisions as "fatal" to the Plaintiff's causes of action in those cases.

Inasmuch as the Plaintiff failed to provide the required notice as set forth in the Governmental Immunity Act within the statutory 180 day time period, these Defendants are entitled to Summary Judgment in their favor and against the Plaintiff, and the Complaint in its entirety as to these Defendants should be dismissed with prejudice.

John P. Mitzner (No. 3732)
of HALL & EVANS
Attorneys for Defendants
717-17th Street, Suite 2900
Denver, Colorado 80202
293-3500

EXHIBIT A

DISTRICT COURT, BOULDER COUNTY, COLORADO

Civil Action No. 82-CV-0957, Division 3

AFFIDAVIT

JERRY GRONQUIST, d/b/a/ GRONK'S
DONUT AND SANDWICH SHOP

Plaintiff,

vs.

BOULDER URBAN RENEWAL AUTHORITY, et al.,

Defendants.

COUNTY OF BOULDER)
)ss
STATE OF COLORADO)

Affiant Paul Benedetti, being first duly sworn, deposes and says:

1. That I am special counsel for the Boulder Urban Renewal Authority and have served in said capacity since 1981.

2. That the notice attached hereto as Exhibit A was received in my office on May 3, 1982.

3. That no other written notice of any claim raised in the above action has been filed with my office, with the Office of the Boulder City Attorney or with the governing board of the Boulder Urban Renewal Authority.

PAUL C. BENEDETTI

Subscribed and sworn before me this 16th day of February, 1983.

My commission expires: October 10, 1986.

NOTARY PUBLIC
Suite 206 Diagonal Commons Building
3405 Penrose Place
Boulder, Colorado 80301

RONALD H. HOLMES, J.L.

ATTORNEY AT LAW

1245 Pearl, Suite 202

Boulder, Colorado 80302 (303) 440-4404

April 30, 1982

Mr. James Harm, Esq.
Paul C. Benedetti, P.C.
Diagonal Commons, Suite 206
3406 Penrose Place
Boulder, Colorado 80301
Re: Gronquist d/b/a Gronk's Donut and Sandwich Shop

Dear Mr. Harm:

In accordance with 24-10-109 C.R.S. 1973 as amended, I am notifying you that my client, Mr. Jerry Gronquist is contemplating an action against the Boulder Urban Renewal Authority due to actions of the Authority during the years 1981 and 1982.

During the later part of 1980 and the early part of 1981, Mr. Gronquist had decided that, under the circumstances, he woud agree to relocate from his present facilities because of the pending condemnation of the building that he was in, owned by the Kobeys.

At the direction of Mr. Tom Mann of the Boulder Urban Renewal Authority, he proceeded to attempt to find suitable facilities within the City of Boulder in which to relocate his business. He then hired an architect as well as a consultant and a financial advisor to determine the expenses of his move. These were out-of-pocket costs to Mr. Gronquist which Mr. Mann said were payable by BURA and have not been paid yet, even though Mr. Gronquist has asked about numerous times. At the same time he contacted various organizations to find a location and in fact did find a location at the Thunderbird Shopping Center which was a vacant 7-11 store. On the 16th of March, 1981, he entered into a lease with the Frazier Meadows Development Corporation to lease the premises beginning May 1, 1981, for a period of five years.

Within seven days from the signing of the lease, Mr. Gronquist presented a signed copy of the lease as well as a summary of expenses for the move to Mr. Tom Mann of the Boulder Urban Renewal Authority.

Because of various delays in making a determination as to the amount that Mr. Gronquist would be entitled to for relocation expenses, the above-mentioned lease had to be extended for 15 days to the middle of May, 1981. During this period of time, Mr. Gronquist attempted to obtain commitments from his bank so that as soon as some amount was approved for relocation expenses, he would have enough funds to immediately relocate his business into the new facilities. During this time, he cooperated fully with Tom Mann concerning all his requests regarding information about the move and verification of expenses. He also relied on Tom Mann to come up with figures as soon as possible so that he could in fact move.

Mr. Gronquist did not receive a relocation settlement agreement draft until sometime in September, 1981, and then in the amount of approximately $57,000 as opposed to a request for approximately $85,000.

Immediately upon receipt of this information, Mr. Gronquist, in a writing dated September 15, 1981,

requested that the Boulder Urban Renewal Authority reviewed the offer, because the funds were insufficient to relocate his business.

On October 30, 1981, Mr. Gronquist received a letter from Janet Roberts, Chair for the Authority's Relocation Committee denying the request for approximately $85,000 and instead moved to authorize execution of a relocation settlement agreement in the amount of approximately $57,000. This is now approximately seven months after Mr. Gronquist originally requested relocation benefits.

Because of this extraordinary delay, the lease that Mr. Gronquist had on the 7-11 store expired and he was no longer able to use that facility. Also as a result of the delay, he was forced to forfeit $1,470 which he had paid in advance on the lease.

Mr. Gronquist has searched diligently for other locations within Boulder to relocate his business and the only location that he has been able to find which would be both economically and competitionally feasible will not even be available until August or September of 1982, and now the contractor is

vacillating as to whether or not he wants Mr. Gronquist to relocate there.

Mr. Gronquist now has to go to the expense of up-dating and modifying his prior request for funds because his potential new location will require a different set of plans than the location which is no longer available.

In addition, these delays have caused Mr. Gronquist great financial loss because he had to stay in Crossroads during it period of condemnation and the vacating of numerous stores in the area due to condemnation proceedings. He is presently losing approximately $75.00 per day in sales as compared to the prior year's sales and has in fact been losing money on a daily basis for a number of months.

He is being asked to move at the end of April, 1982, yet there is no facility available for him to move to that is satisfactory, and it is unquestioned that should he have to vacate the premises at the end of April, 1982, that he will lose his ability to generate income but still have the expenses of equipment previously purchased and therefore faces the very real possibility of financial ruin.

Because of the above action by the Boulder Urban Renewal Authority and Mr. Tom Mann acting as agent of the authority, Mr. Gronquist has been damaged in an amount as yet to be determined, and may seek redress for his damages in a court of law naming the Boulder Urban Renewal Authority as a Defendant.

Very truly yours,

Ronald H. Holmes

/pk

Attachment C

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF BOULDER

STATE OF COLORADO

Action No.82CV0957-3

JERRY GRONQUIST

vs. MINUTE ORDER

BOULDER URBAN RENEWAL

AUTHORITY, et al

On May 9, 1983 the following actions were taken in the above-captioned case and the Clerk is directed to enter these proceedings in the register of actions:

APPEARANCES:

I

INTRODUCTION

Defendants, Boulder Urban Renewal Authority, et al, have filed a motion for summary judgment and memorandum brief with a supporting affidavit. Plaintiff, Jerry Gronquist, has objected to the motion and has filed a supporting brief. Having reviewed the

motion, briefs, and file the court enters the following ruling and order:

II

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy and is warranted only upon a clear showing that there is no genuine issue of material fact. Abrahamson v. Mountain States Telephone and Telegraph Corp., 177 Colo. 422, 494 p.2d 1287 (1972). All doubts must be resolved against the moving party. Ginter v. Palmer and Co., 196 Colo. 203, 585 p.2d 583 (1978). Once the movant makes a convincing showing that genuine issues of fact are lacking, the opposing party may not rest upon the mere allegations or denials of his pleading but must demonstrate by specific facts that a real controversy exists. Sullivan v. Davis, 172 Colo. 490 p.2d 218 (1970). Defendant's motion is measured against the foregoing standard.

III

ANALYSIS

The only issue raised in defendant's motion for summary judgment concerns whether plaintiff has failed

to comply with the notice provisions of the Colorado Governmental Immunity Act, C.R.S. 1973 paragraph 24-10-101 et seq. The section pertaining to the notice requirements states that notice shall be provided within one hundred eighty days "after the date of discovery of the injury." C.R.S. 1973 paragraph 24-10-109(1). Failure to comply with the notice requirements is a complete defense to any action under the Act.

It is the plaintiff's position that his injury occurred on June 1, 1982, the date his lease was terminated by the defendant. If injury did not occur until June 1, 1982 then plaintiff's notice given to defendant May 3, would have been timely.

Defendants urge that plaintiff's injury occurred, if at all, on October 10, 1981 when plaintiff received notice form defendants that plaintiff would be compensated $57,000 and not the larger amount that plaintiff requested. Defendant also take note of the plaintiff's failure to plead compliance with the notice requirement.

This court finds that plaintiff's injury occurred on October 10, 1981, on the date plaintiff received notice from the defendants concerning the amount plaintiff would be compensated. It was on October 10, 1981 that plaintiff had notice of the fact that the defendants would not compensate the plaintiff the full amount of relocation expense that the plaintiff had requested. Furthermore, plaintiff had, prior to October 10, 1981, contact with the defendants concerning plaintiff's relocation and allegedly had trouble with the defendants concerning relocating. Thus, plaintiff cannot claim that the injury did not occur until his lease was actually terminated on June 1, 1982.

Plaintiff failed to give timely notice pursuant to C.R.S. 1973, 24-10-101 et seq. Such failure to meet the statutory condition precedent is fatal to plaintiff's cause of action. Defendant's motion for summary judgment is granted.

BY THE COURT:

_____

Morris W. Sandstead, Jr.

CC: Ronald H. Holmes

John P. Mitzner, 717-17th St., #2900, Denver, CO

Attachment D

COURT OF APPEALS

No. 83CA0699

JERRY GRONQUIST, d/b/a)
GRONK'S DONUT AND SANDWICH SHOP)
Plaintiff-Appellant,)
v.)
BOULDER URBAN RENEWAL AUTHORITY;)
DOUGLAS L. HOUSTON, Executive)
Director, BURA; TOM MANN,)
Individually and as Real Estate and)
Relocation Officer of BURA,)
Defendants-Appellees.)

Appeal from the District Court of Boulder County
Honorable Morris W. Sandstead, Jr., Judge

DIVISION I

Opinion by JUDGE SMITH

Pierce and Tursi, JJ, concur

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS

Ronald H. Holmes, Boulder, Colorado
Attorney for Plaintiff-Appellant

Hall & Evans John P. Mitzner, Denver, Colorado
Attorneys for Defendants-Appellees

Plaintiff, Jerry Gronquist, appeals a summary judgment of dismissal entered against him based upon his failure to file timely notice of a claim under 24-10-109(1), C.R.S. (1982 Repl. Vol. 10). We reverse and remand for trial.

According to the allegations in his complaint, Gronquist was the owner of a small business within an area subject to a relocation plan of the Boulder Urban Renewal Authority (BURA). On March 16, 1981, in anticipation of relocating his business, Gronquist entered into a lease, which was to commence on May 1, for a new store location. Gronquist informed BURA of his relocation plans, and in late March presented BURA with a summary of expenses for the relocation which he calculated to be over $85,000. Various negotiations ensued between BURA and Gronquist, but a final notice from the Relocation Committee stating that BURA would pay at most $56,844 for relocation expenses was not presented to Gronquist until October 10, by which time the new lease, despite an extension, had expired. Gronquist was unable to find another suitable location before June 1, 1982, when BURA terminated his lease.

As a result, of this termination Gronquist alleges that he was forced to close his business.

On April 30, 1982, Gronquist notified BURA of his intention to bring suit. On July 8, 1982, Gronquist filed his complaint seeking damages which he alleges resulted from the loss of his business. He asserts in his first cliam that he lost his business because of BURA's "extraordinary and inexcusable Acts," asserts in his second claim that the acts of BURA and its agents constituted "extreme and outrageous conduct," and asserts in his third claim that the conduct of BURA and its agents was malicious and done with a willful disregard for his rights, entitling him to exemplary damages.

BURA moved for summary judgment on the grounds that Gronquist failed to comply with the notice provisions of 24-10-109(1) C.R.S. (1982 Repl. Vol. 10), which states that:

> "Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment shall file a written notice as provided in this

section within one hundred eighty days after the date of the discovery of the injury."

The trial court granted the motion, finding that Gronquist's injury occurred on October 10, 1981, when he received notice that he would receive only $56,844 compensation, and that he failed to provide the required statutory notice within 180 days of that date.

On appeal, Gronquist's sole contention is that his injury occurred later than October 10, 1981 - either in February 1982, when BURA first obtained a right of possession under condemnation, or June 1, 1982, when Gronquist was forced to vacate the premises and lose his business. He argues that summary judgment on the basis of untimely notice was therefore in error. We agree that the complaint, although hardly a model of clarity can be read as asserting that some of the conduct complained of occurred after October 10, 1981, and as late as June 1, 1982.

The 180-day notice period is measured from the date that the injured party discovers the injury and the basic and material facts underlying the claim

arising from that injury. State v. Young, 665 p.2d 108 (Colo. 1983). Once the injury and the basis of the resulting claim are known, an aggrieved party may not wait to give notice until all the elements of his claim mature. Carrol v. Regional Transportation District, 638 p.2d 816 (Colo. App. 1981).

It is true that here, according to Gronquist's allegations, most of the actions constituting the basis of his claims were known to him by October 10, 1981. However, he did not know that he had suffered the injury of which he complains - loss of his business - until June 1, 1982. That was the date on which he claims he was forced to close his business because BURA had terminated his lease.

Reading Gronquist's complaint in the light most favorable to him, as we are required to do, we conclude that the trial court would have been correct in entering summary judgment of dismissal if the sole injury alleged had been the loss of the new lease at an alternate location. This injury and the acts which he alleged were its cause, were known to him on October 10, 1981, more than 180 days prior to his

giving notice of his claim. However, Gronquist has alleged an injury which occurred on June 1, 1982, as opposed to, or in addition to, the one that may have occurred on October 10, 1981. This was after the filing of his notice of claim pursuant to 24-10-109 (1), C.R.S. (1982 Repl. Vol. 10) as was the act of BURA in terminating his lease. Moreover, although most of the specific acts of which Gronquist complains clearly occurred prior to October 10, 1981, we are unable to determine if his general assertions of wrongful, willful, or outrageous acts on the part of BURA and its agents also refers to their act in terminating the lease. On summary judgment, we must give him the benefit of this doubt. Jones v. Dressel, 623 p.2d 370 (Colo. 1981).

Summary judgment may not be entered if genuine issues of material fact remain for resolution. Smith v. Hoffman, 656 p.2d 1327 (Colo. App. 1982). Since Gronquist's allegations raise a factual question whether the injury or the act or acts causing it, alleged in his first claim occurred more than 180 days from the statutory notice, summary judgment on this issue was error.

This result is not affected by the fact that under this analysis statutory notice was given before the injury occurred. The policies underlying 24-10-109 are accomplished by notice given when the injury is anticipated, but prior to its occurence. State Compensation Insurance Fund v. Colorado Springs, 43 Colo. App., 602 p.2d 881 (1979).

The judgment is reversed and the cause is remanded for trial.

JUDGE PIERCE and JUDGE TURSI concur.

Attachment E

DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO

Civil Action No. 82 CV 0957, Division 3

MOTION FOR SUMMARY JUDGMENT

JERRY GRONQUIST, d/b/a/ GRONK'S DONUT AND SANDWICH SHOP,

Plaintiff,

v.

BOULDER URBAN RENWAL AUTHORITY; DOUGLAS L. HOUSTON, Executive Director, BURA; TOM MANN, individually and as Real Estate and Relocation Officer of BURA,

Defendants.

COME NOW the above named defendants, by and through their attorneys, HALL & EVANS, and, pursuant to CRCP Rule 56 herewith submits the following motion for summary judgment. As grounds therefore, defendants state as follows:

1. Because plaintiff has no right to relocation benefits other than as provided for in the Relocation Handbook, he has failed to state a claim in tort for which relief can be granted.

2. Because defendants' acts are, as a matter of law, discretionary, they are insulated from liability under the doctrine of official immunity.

Respectfully submitted,

John P Mitzner, #3732
Alan Epstien, #10473
of HALL & EVANS
717 17th Street, # 2900
Denver, CO 80202
(303) 293-3500

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing MOTION FOR SUMMARY JUDGMENT, has been mailed, postage prepaid, this 19th day of July, 1985, addressed to the following:

Theodore P. Koeberle, Esq.
3000 Pearl Street, #100
Boulder, CO 80301

Attachment F

DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO

CIVIL ACTION NO. 82 CV 0957-3

ORDER

JERRY GRONQUIST, d/b/a GRONK'S DONUT AND SANDWICH SHOP,

Plaintiff,

vs.

BOULDER URBAN RENEWAL AUTHORITY; DOUGLAS L. HOUSTON, Executive Director of BURA; TOM MANN, individually and as Real Estate and Relocation Officer of BURA,

Defendants.

This action is before the Court on Defendants' Supplemental Motion for Summary Judgment. The Court has reviewed the Motions, the briefs, and the file.

FACTS

In March of 1979, Plaintiff was informed that he would have to move his shop pursuant to an urban renewal plan administered by Defendant BURA. In March of 1981, he made arrangements for leasing another

location and submitted a summary of relocation costs totalling $85,000 to BURA. In September of 1981, BURA made him a relocation settlement offer of $57,000 refusing to cover the cost of upgrading his equipment in the new location to meet the new Boulder codes. His lease in the redevelopment area terminated on 1 June 1982. By that time he had no place to which he could move and was forced to close his business.

In July, 1982, Plaintiff began this action, claiming that Defendants BURA and Tom Mann caused him to lose his business because of their delay in making a decision on his relocation costs, and their refusal to compensate him for the cost of upgrading necessitated by the move. He has claimed damages for outrageous conduct, as well as exemplary damages.

In July of 1985, Defendants filed a Motion for Summary Judgment which was denied by this Court. At that time the Court ruled that it did not have enough evidence to determine the issues by summary judgment. The Court based its decision, at least in part, on the fact that the Relocation Handbook relied upon by Defendants was not properly admitted into evidence.

STANDARD OF REVIEW

Summary Judgment is a drastic remedy, not to be granted without a clear showing that there is no genuine issue as to any material fact. The trial court must resolve all doubts as to the existence of factual controversy and must determine that the moving party is entitled to a judgment as a matter of law. Should the movant make a convincing showing that genuine issues of fact are lacking, the opposing party must demonstrate by specific facts that a real controversy exists. CRCP Rule 56. The trial court must resolve all doubts as to whether a factual controversy exists against the moving party. Jones v. Dressel, 623 p.2d 379 (Colo. 1981). This motion is measured against the foregoing standard.

MERITS

The first issue to be addressed is whether Defendants are protected by the doctrine of official immunity. The doctrine does not cover the acts of a governmental employee if he was acting beyond the scope of his authority. In the opinion of 14 August 1985, this Court stated:"there is no evidence or allegations of facts which would indicate that Defendants were acting outside the scope of their authority."

In order to decide whether official immunity applies in this particular case, the Court must determine as a matter of law whether of not Defendants' acts were discretionary. Discretionary acts are cloaked with immunity without a further balancing test. Winters v. City of Commerce City, 648 p.2d 175 (Colo. App. 1982). C.R.S. 31-25-105 defines the power granted to urban renewal authorities, and in subsection (j) authorizes the authority to make "reasonable relocation payments. . . for moving expenses and actual direct losses of property (except goodwill and profit) resulting from [their] displacement." There are no further guidelines as to what these payments include. In fact, the statute does not require such payments; it only confers the power to make such payments if "necessary and convenient." The Court reads the statute as intending to leave compensation decisions, except pertaining to goodwill and profit, to the discretion of the agency.

Plaintiff has claimed that he has a constitutional right to compensation for costs incurred because he had to move to a new location. In Auraria

Businessmen against Confiscation, Inc. v. Denver Urban Renewal Authority, 183 Colo. 441, 447, 517 p.2d 845 (1974), the Colorado Supreme Court held that there is nothing in the state or federal constitutions to mandate compensation for losses incidental to dislocation by an urban renewal authority. The Court also stated that the purpose of the statute is to minimize hardship, not to erase it completely. 183 Colo. at 448.

The Relocation Handbook drawn up by BURA is now properly before this Court. Tom Mann's affidavit states that he assisted in drawing up the handbook as one of his duties as relocation officer, and it was in use when the decision was made as to which of Plaintiff's expenses would be compensated. BURA through its officers Tom Mann and Douglas Houston, had the discretionary power to determin which costs would be compensated, and once guidelines were established, the officers acted with discretion in applying them to particular cases.

The next issue to be addressed is whether Defendants acted reasonable when they made their decision. The record before the Court indicates that

Plaintiff is contesting both the timeliness of the relocation offer, and its reasonableness. Judicial review of discretionary agency actions is limited to a finding that the agency abused its discretion. C.R.C.P. Rule 106 (4)(I).

There is no evidence in the record that BURA employees conspired to delay the relocation offer in order to cause Plaintiff to lose his business. Although BURA took six months to approve all but one of Plaintiff's claimed moving costs and make him an offer of $57,000, the offer was made and affirmed on appeal by the agency well over six months before Plaintiff was forced to vacate the premises.

BURA granted all of Plaintiff's requests except for the cost of upgrading equipment to meet the new Boulder City Code. Plaintiff contends that this cost was only necessary because he was forced to move. Plaintiff also claims that BURA acted arbitrarily because it did not consider the reasonableness of the expense. The Court finds that BURA first had to decide whether the cost itself was to be covered as a reasonable cost of moving. If it was not covered, whether it was reasonable is irrelevant.

The Relocation Handbook was drawn up to provide guidelines for BURA in deciding reasonable costs of moving for anyone forced to relocate because of the urban renewal project. Defendant Tom Mann helped to prepare the guidelines before he had any knowledge of Plaintiff's claims. In Section 7, actual compensable expenses are listed, including a variety of foreseeable costs of moving a business. Section 11 lists the ineligible costs and expenses, including "Any additional expense of a business or non-profit organization which was incurred because of operating in a new location." Handbook, (11) (A) (7). It was not unreasonable for BURA to find that the cost of upgrading equipment to comply with the new code requirements was such an additional expense. As stated above, the purpose of the statute is to minimize hardship, not to erase it completely. 183 Colo. at 448.

The Court therefore finds that BURA and its employees are protected by official immunity. The Court further finds that BURA and its employees did not abuse their discretion when they decided that the cost of upgrading equipment to meet city code for the new location was not a compensable relocation expense.

Defendants' Supplemental Motion for Summary Judgment is hereby GRANTED, and this action is dismissed.

Dated this 19 day of May, 1986.

BY THE COURT:

Richard C. McLean

District Judge

cc. John Mitzner, HALL & EVANS (mail)

Ben Thompson

THOMPSON, KOEBERLE, MORELAND & GRESCHLER (relay)

Attachment G

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF BOULDER

STATE OF COLORADO

Action No. 82 CV 0957-3

MINUTE ORDER

JERRY GRONQUIST d/b/a GRONK'S DONUT AND SANDWICH SHOP,

Plaintiff,

vs.

BOULDER URBAN RENEWAL AUTHORITY ET AL.,

Defendants.

On August 14, 1985 the following actions were taken in the above-captioned case and the Clerk is directed to enter these proceedings in the register of actions:

APPEARANCES: NONE

Defendants have filed a Motion for Summary Judgment with supporting memorandum. Plaintiff has responded. On the basis of the Briefs and File, the Court enters the following Ruling and Order:

I.

Summary Judgment Standard

Summary judgment is a drastic remedy and is not to be granted absent a clear showing that there is no genuine issue as to any material fact. Tapley v. Golden Big O Tires, 676 p.2d 676 (Colo. 1983). The trial court must resolve all doubts as to whether an issue of fact exists against the moving party. Jones v. Dressel, 623 p.2d 370 (Colo. 1981). Once the movant makes a convincing showing that genuine issues of fact are lacking, the opposing party may not rest upon the mere allegations of denials of his pleading but must demonstrate by specific facts that a real controversy exists. Sullivan v. Davis, 172 Colo. 490, 474 p.2d 218 (1970). The Defendants' motion is measured against the foregoing standard.

II.

Facts

Plaintiff owned a business in what is now Crossroads Mall. Pursuant to an urban renewal plan, Defendant BURA notified Plaintiff that he would have to move his business. Plaintiff located a new site for

his business and entered into a new lease. He then submitted a request for relocation expenses to BURA for some $84,000. Some months later, BURA informed Plaintiff that they would ony pay $57,000 for these expenses. Plaintiff appealed the award within BURA and it was affirmed. Plaintiff thereafter brought this action. He alleges that acts of BURA in offering an insufficient award and delaying that offer unreasonably ultimately caused him to lose his business.

III.

Merits

Defendants first argue that as Plaintiff has no constitutional or statutory right to relocation payments beyond those rights delineated by BURA itself, Plaintiff has no grounds to complain as to the award offered, as Plaintiff himself has admitted that the award was fair within the guidelines promulgated by BURA. The Court must examine the case law and the statutory basis of relocation payments to address this argument.

It is clear that under the Colorado Constitution the expenses of relocating one's business pursuant to eminent domain proceedings are not regarded as a "taking" and therefore there is not constitutional right to such payments upon condemnation of one's property by the state. Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Authority, 183 Colo. 441, 517 p.2d 845 (1974) However, the state legislature has given the power to local urban renewal authorities to grant such payments. C.R.S. 31-25-105 states:

> Powers of an authority. (1) Every authority has all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this part 1, including, but not limited to, the following powers in addition to others granted in this part 1:
>
> ...
>
> (j)To make reasonable relocation payments to or with respect to individuals, families, and business concerns situated in an urban renewal area which will be displaced as provided in

subparagraph (IV) of paragraph (i) of this subsection (1) for moving expenses and actual direct losses of property (except goodwill or profit) resulting from their displacement for which reimbursement or compensation is not otherwise made, including the making of such payments financed by the federal government;

Pursuant to C.R.S. 31-25-101 et seq., the Boulder City Council passed an ordinance creating B.U.R.A.. Boulder City Ordinance 4411. B.U.R.A., pursuant to the above quoted statute, adopted a handbook with guidelines under which relocation payments were to be computed and paid. (Plaintiff makes the point that the handbook submitted is not certified as that which governed the payments in this particular case, and therefore it is not before this Court as evidence supporting Defendant's motion . While this is technically true, the Court is only acknowledging that there were some guidelines for payments in effect at the time, as for the purposes of this ruling the actual guidelines are irrelevant.)

Defendants argue that under the handbook, such payments are "wholly a matter of discretion of the Authority.", implying that they are not reviewable. This argument goes too far. In reality, this aspect of the action is in the nature of a Rule 106 action; that is, an allegation that an inferior tribunal has exceeded its jurisdiction or abused its discretion. See C.R.C.P. Rule 106(a)(4). This rule contemplates the making of a record below and a determination of the issues by briefs. Although there is no record in this case, the Court sees no reason why this issue cannot be resolved by brief. Therefore, the Court will require that the parties submit briefs on the issue of the propriety of the amount of the offered award, based on the enabling statute and the existing regulations promulgated in reference to that statute.

Plaintiff's case is of course not disposed of whether or not the amount of the offered award is proper. Plaintiff alleges that the totality of the actions by Defendants, including delays and broken promises, in addition to a too low offer to allow Plaintiff to relocate his business, ultimately caused

him to lose his business, with the resulting damages. Since there still exists an issue of tact as to whether Defendants acted unreasonably, Summary Judgment on these issues is inappropriate. However, there still exists the issue of whether or not Defendants are immune to liability under the doctrine of official immunity. This issue is addressed below.

Defendants next argue that their acts were discretionary in nature and therefore they are not liable to suit under the common law doctrine of official immunity. Cooper v. Hollis, 42 Colo. App. 505, 600 p.2d 109 (1979). If an act is found non-discretionary, the decision whether or not immunity is appropriate is determined from a balancing of the consideration of harm to the individual citizen against the policy of promoting effective government." Id. Even if an act is one which could be labelled discretionary, official immunity will not lie of the alleged wrongful act is one taken outside the scope of the actor's authority. Belveal v. Bray et al, 253 F. Supp. 606 (D.C. Colo. 1966). In that case, Plaintiff alleged that he was wrongfully denied parole, and furthermore

that the Parole Board had denied parole without the required quorum being present. Although the granting or denial of parole is generally considered a discretionary act from which liability cannot flow, the decision being made outside the scope of the board's authority defeated their immunity. Here, Plaintiff alleges that Defendant Mann intentionally delayed and misled Plaintiff to force him to take less money that he was entitled to, and therefore Defendant was acting outside the scope of this authority. However, an allegation of intentional or malicious acts does not in and of itself make the acts outside the scope of an official's authority in the context of official immunity. See Troxel v. Town of Basalt, 682 p.2d 501 (Colo. App. 1984) ((official immunity lies despite allegations of intentional wrongful acts); See also Belveal, supra, ("Allegations of malice, while sufficient to raise a cause of action in those few jurisdictions recognizing only a qualified privilege, do not defeat the absolute liability [sic] recognized by the great weight of federal decisions"). Since there is no evidence or allegations of facts which

would indicate that Defendants were acting outside the scope of their authority in this context, Plaintiff cannot avoid the doctrine of official immunity under this theory.

The next inquiry is whether Defendants acts were discretionary or not. "(T)he test for whether an official shall be immune from liability for money damages is not mechanical." Jackson v. Kelly, 557 f.2d 735 (10th Cir 1977). In Colorado, the key to determining whether or not immunity lies is the nature of the guidelines or policies which govern the actions of the official. In Winters v. City of Commerce City, 648 p.2d 175 (Colo. App. 1982), a official who denied a building permit was held not to be immune from suit, because a previous court case had held that there was a duty to grant a permit if the application is in conformance with the existing zoning ordinances. See Western Paving Construction Co. v. Board of County Commissioners, 181 Colo. 77, 506 p.2d 1230 (1973). In other words, the official was exercising no discretion in determining whether or not to deny the permit; he had to grant the permit because the proposed building met

the zoning requirements. In contrast, in Troxel v. Town of Basalt, 682 p.2d 501 (Colo. App. 1984), city officials who voted to deny a change order claim were held to be immune to suit. There, the officials were not bound by specific guidelines, but were merely exercising their judgment as to the propriety of Plaintiff's claim.

The Court is of the opinion that it simply does not have adequate evidence before it to determine this issue at this time. As Plaintiff points out, the copy of the Handbook submitted by Defendants cannot really be relied upon to grant summary judgment, without some certification that it is the Handbook in force at the times revelant to this action. Thus, the Court has no evidence before it as to whether Defendant Tom Mann was exercising his judgment in administering the relocation awards, as opposed to following strict guidelines so as to make his duties non-discretionary. However, Plaintiff should be advised that a directed verdict on this issue appears to be a distinct possibility in this case.

IT IS THEREFORE ORDERED that as there exist disputes as to materials facts, Summary Judgment must be denied at this time. The parties are ordered to submit Briefs by August 28, 1985, on the issue of whether the amount offered to Plaintiff for relocation benefits was an abuse of discretion.

BY THE COURT:

Morris W. Sandstead, Jr.

District Judge

CC: John P Mitzner, Hal & Evans, 717 17th Street Suite 2900, Denver, Co. 80202

Ben Thompson (relay)

Attachment H

COLORADO COURT OF APPEALS

No. 86CA 0986

JERRY GRONQUIST d/b/a/ GRONK'S DONUT AND SANDWICH SHOP

Plaintiff-Appelant,

v.

BOULDER URBAN RENEWAL AUTHORITY; DOUGLAS L. HOUSTON, Executive Director of BURA; Tom Mann, individually and as REAL ESTATE AND RELOCATION OFFICER OF BURA,

Defendants-Appellees.

Appeal from the District Court of Boulder County

No. 82CV0957-3

Honorable Richard C. McLean, Judge

Honorable Morris W. Sandstead, Judge

DIVISION IV JUDGMENT AFFIRMED

Opinion by JUDGE NEY

Babcock and Hume, JJ., concur

Ira Greschler, P.C.

Ira E. Greschler, Boulder, Colorado

Attorney for Plaintiff-Appellant,

Hall & Evans

Alan epstien

John P. Mitzner, Denver Colorado

Attorneys for Defendants-Appellees.

In this tort action, plaintiff appeals the summary judgment entered in favor of defendants, boulder Urban Renewal Authority (BURA), its executive director, and its relocation officer. Plaintiff claimed damages for the loss of his business and outrageous conduct resulting from the displacement of his sandwich shop by defendants' redevelopment project. We affirm.

As compensation for relocation expenses, plaintiff claimed approximately $85,000. Plaintiff rejected BURA's $57,000 offer. The difference was to cost of a grease trap ventilation hood that was required at plaintiff's proposed new, but not at his existing, location. BURA's offer was affirmed on administrative appeal. Because plaintiff did not, in fact, relocate, he was not paid any relocation expenses.

Plaintiff claims that: (1) BURA arbitrarily denied him the costs of the ventilation hood; (2) the executive director and the relocation officer of BURA were guilty of outrageous conduct in delaying the payment of full compensation; and (3) prlintiff had a constitutional right to compensation for the termination of his business because he was not paid full relocation expenses.

The trial court determined that there were no disputed issues of material fact, and this, pursuant to C.R.C.P. 56(c), the claims could be determined as a matter of law. The trial court granted summary judgment, finding that BURA's acts were neither arbitrary nor an abuse of discretion, the individual defendants were immune pursuant to 24-10-101, et seq., C.R.S. (1982 Repl. Vol 10), and plaintiff had no constitutional right to compensation for relocation expenses. We agree with these conclusions.

I

Plaintiff contends that BURA's relocation policy entitled him to compensation for the ventilation hood. We disagree.

Relocation expenses are statutorily permissible, but not mandatory. Section 31-25-105(l)(j). C.R.S. (1986 Repl. Vol. 12B) grants discretion to BURA to set policy for such compensation. See Auraria Businessmen against Confiscation, Inc. v. Denver Urban Renewal Authority, 183 Colo. 441, 517 p.2d 845 *1974(.

BURA developedd a relocation policy, published in a handbook which was made part of the record. Plaintiff grounds his claim on his interpretation of the handbook section which provides for compensation for the cost of "licensing." He argues that he was required to satisfy the current building code at a new, but not at his existing, location as a condition of being "licensed." We disagree with plaintiff's interpretation and conclude that the plain meaning of the license compensation provision refers to the license fee, not the cost of upgrading his equipment to meet the current building code. Also, the handbook specifically excludes compensation "for expenses incurred because of operating in a new location." Hence, the refusal to pay the claimed expense was not an abuse of discretion.

II

Plaintiff contends the trial court erred in finding, as a matter of law, that defendants were immune from suit by virtue of the Colorado Governmental Immunity Act, 24-10-101, et seeq., C.R.S. (1982 Repl. Vol. 10). We disagree.

The decisions of BURA's executive director and relocation officer, asserted as the basis of plaintiff's outrageous conduct claim, were discretionary. Section 31-25-105(l)(j), C.R.S. (1986 Repl. Vol. 8B); Auraria Businessmen, supra. Thus, defendants were qualifiedly immune. See Trimble v. City & County of Denver, 697 p.2d 716 (Colo. 1985); Troxel v. Town of Basalt, 682 p.2d 501 (Colo. App. 1984).

The trial court properly found that there was no evidence that these individual defendats were acting outside their authority. The trial court, therefore, correctly ruled that plaintiff's tort claims were barred by the Governmental Immunity Act.

We conclude, as a matter of law, that plaintiff's claim of outrageous conduct, which is based on his allegations of delay of payment by

defendants resulting is the loss of his business, has no merit. See Meiter v. Cavanaugh, 40 Colo. App. 454, 580 .

III

Plaintiff's final argument that he is entitled to relocation expenses on constitutional grounds is without merit, such contention having been dispositively determined to the contrary in Auraria Businessmen, supra.

Judgment affirmed.

JUDGE BABCOCK and JUDGE HUME concur.

Attachment I

SUPREME COURT, STATE OF COLORADO

Case No. 88SC530

Certiorari to the Colorado Court of Appeals 86CA0986

Boulder County District Court 82CV0957-3

ORDER OF COURT

JERRY GRONQUIST d/b/a GRONK'S DONUT AND SANDWICH SHOP

Petitioner,

v.

BOULDER URBAN RENEWAL AUTHORITY; DOUGLAS L. HOUSTON, EXECUTIVE DIRECTOR OF BURA; TOM MANN, individually and as REAL ESTATE and RELOCATION OFFICER OF BURA,

Respondents.

Upon consideration of the Petition for Writ of Certioari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 6, 1989.

CC: Gary Sonke, Clerk
Colorado Court of Appeals

Law Office of Ira Greschler,P.C.
Ira. E. Greschler
2975 Valmont Road, Suite 310
Boulder, Colorado 80301

Hall & Evans
Alan Epstein
200 17th Street #1700
Denver, Colorado 80202

Honorable Richard C. McLean
Honorable Morris W. Sandstead
20th Judicial District
P.O. Box 4249
Boulder, Colorado 80306-4249